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Political Affairs

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Bill Memo
Senate Bill 305 – Revise subdivision and platting act
Sponsor: Sen. Bruce Tutvedt

Hearing:
Senate Local Government Committee
Feb. 6, 2009, Room 303

Introduction

The Montana Subdivision and Platting Act (the Act) was designed to create a predictable process of land division throughout Montana, while providing for local control of those items of specific concern to individual cities and counties. Unfortunately, uncertainty and confusion have taken over the process, and cities, counties, landowners, and neighbors no longer know how the process will or should proceed. With these revisions, it is believed that the Act will do more to promote both economic growth and public health and safety.

The primary purpose of these revisions and clarifications are to remove uncertainties so that all stakeholders know what is required of them. The revisions should reduce expenses for landowners, reduce litigation against cities and counties, and generally improve public confidence in the subdivision process. This bill clarifies both the information required to be submitted to the city or county as well as the manner in which the city or county processes that information and holds hearings.

Some of the changes outlined below amend Senate Bill 116 (SB 116) enacted in the 2005 Legislature. As written, SB 116 effectively balanced concerns for due process and public participation. However, based on our experience over the past few years with the subdivision review process and the application of SB 116, the amendments proposed herein are necessary to enhance the predictability and consistency of the review process.

Analysis by Section

NEW SECTION. **Section 1.** Policy. It is the policy of the State of Montana that the health and safety of the public be protected and promoted to the full extent practicable through the ownership, use, transfer, and subdivision of land while protecting the rights of property owners.

RATIONALE: This new section clarifies the overarching purpose of the Act and is appropriate in light of the complexity of the Act and Montana's rich

heritage of protecting property rights. With this change, the Act will also conform to §7-21-1001(c)(1), MCA.

Section 1. Section 76-3-501, MCA, is amended to read:

"**76-3-501. Local subdivision regulations.** The governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for:

(1) the orderly development of their jurisdictional areas;

(2) the coordination of roads within subdivided land with other roads, both existing and planned;

(3) the dedication of land for roadways and for public utility easements;

(4) the improvement of roads;

(5) the provision of adequate open spaces for travel, light, air, and recreation;

(6) the provision of adequate transportation, water, and drainage;

(7) subject to the provisions of 76-3-511, the regulation of sanitary facilities;

(8) the avoidance or minimization of congestion; ~~and~~

(9) protection of the rights of property owners; and

(~~9~~10) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to fire and wildland fire, or the lack of water, drainage, access, transportation, or other public services or that would necessitate an excessive expenditure of public funds for the supply of the services."

RATIONALE: The amendment under §76-3-501(9), MCA, makes this section correlate with §76-3-102, MCA, which sets forth the purpose of the Act. It makes good sense, and indeed seems necessary, for the content requirements under §501 to reflect accurately the statement of purpose under §102.

Section 3. Section 76-3-504 is amended to read:

"**76-3-504. Subdivision regulations -- contents.** (1) The subdivision regulations adopted under this chapter must, at a minimum:

(a) list the materials that must be included in a subdivision application in order for the application to be determined to contain the required elements for the purposes of the review required in 76-3-604(1);

(b) except as provided in 76-3-210, 76-3-509, or 76-3-609, require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;

(c) establish procedures consistent with this chapter for the submission and review of subdivision applications and amended applications;

(d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;

(e) provide for the identification of areas that~~, because of natural or human-caused hazards,~~ are unsuitable for subdivision development because of natural or human-caused hazards, based on substantial credible evidence. The regulations must prohibit subdivisions in these areas unless the hazards can be eliminated or overcome

by approved construction techniques or other mitigation measures authorized under 76-3-608(4) and (5). Approved construction techniques or other mitigation measures may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901.

(f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;

(g) prescribe standards for:

(i) the design and arrangement of lots, streets, and roads;

(ii) grading and drainage;

(iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet the:

(A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and

(B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres; and

(iv) the location and installation of public utilities;

(h) provide procedures for the administration of the park and open-space requirements of this chapter;

(i) provide for the review of subdivision applications by affected public utilities and those agencies of local, state, and federal government identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review may not delay the governing body's action on the application beyond the time limits specified in this chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of the application by the governing body. <u>Any comment provided pursuant to this part must be submitted in writing no later than 10 working days prior to the public hearing under 76-3-503.</u>

(j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider to:

(i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have a legal right to the water and reserve and sever any remaining surface water rights from the land;

(ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement administered through a single entity that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or

(iii) reserve and sever all surface water rights from the land;

(k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in the subdivision that:

(A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally

entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;

(B) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and

(C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner.

(ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:

(A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or

(B) the water rights are removed or the process has been initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and if the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

(l) require the subdivider, unless otherwise provided for under separate written agreement or filed easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(m) require the subdivider to describe, dimension, and show public utility easements in the subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of public utility services within the subdivision.

(n) establish whether the governing body, its authorized agent or agency, or both will hold public hearings;

(o) establish procedures describing how the governing body or its agent or agency will address information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

(p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

(q) establish a preapplication process that:

(i) requires a subdivider to meet with the agent or agency, other than the governing body, that is designated by the governing body to review subdivision applications prior to the subdivider submitting the application;

(ii) requires~~, for informational purposes only,~~ identification of the state laws, local regulations, and growth policy provisions, if a growth policy has been adopted, that ~~may~~ apply to the subdivision review process;

(iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local, state, and federal government, and any other entities that may be contacted for comment on the subdivision application and the timeframes that the public utilities, agencies, and other entities are given to respond. If, during the review of the application, the agent or agency designated by the governing body contacts a public utility, agency, or other entity that was not included on the list originally made available to the subdivider, the agent or agency shall notify the subdivider of the contact and the timeframe for response.

(iv) requires that a preapplication meeting take place no more than 30 days from the date that the agent or agency receives a written request for a preapplication meeting from the subdivider; and

(v) establishes a time limit after a preapplication meeting by which an application must be submitted as provided in 76-3-604.

(2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster development.

(3) The governing body may establish deadlines for submittal of subdivision applications."

RATIONALE: The amendment adds an evidentiary standard of "substantial credible evidence" under §76-3-504(1)(e), MCA, but does not alter the legal standard, since presumably any decision not based on the same would be arbitrary, capricious, and in violation of the §76-3-625, MCA. The Montana Supreme Court defines "substantial credible evidence" as "evidence that a reasonable mind might accept as adequate to support a conclusion." Montana Petroleum Tank Release v. Crumleys, Inc. (2008), 341 Mont. 33 citing Seltzer v. Morton (2007), 336 Mont. 225.

The amendment of §76-3-504(1)(i), MCA, requiring that certain comments be submitted in writing ten (10) days in advance of the public hearing, does no more than afford applicants fair notice of comments and possible objections regarding their proposals. The amendment also gives cities and counties enough time to incorporate those comments into their recommendations. This notice requirement also saves local governments time and money so that applicants can address the comments before the public hearing, thereby avoiding a new information issue and requiring a second public hearing.

This, and any amendment that enhances notice provided to the applicant or increases the predictability of the process, is a litigation safeguard for local governments so that if they adhere to the statutes, they have a solid defense against any due process violation allegations.

Section 4. Section 76-3-510 is amended to read:

"**76-3-510. Payment for extension of capital facilities.** (1) A local government may require a subdivider to pay or guarantee payment for part or all of the costs of extending local capital facilities within the local government's limits related to public health and safety, including but not limited to public roads, sewer lines, water supply lines, and storm drains to a subdivision.

(2) The costs must reasonably reflect the expected impacts to capital facilities within the local government's limits directly attributable to the subdivision based on credible third party evaluation of the subdivision and its potential impacts. Costs associated with correcting existing deficiencies within capital facilities are not directly attributable to the subdivision.

(3) Subdivisions may not be held to a higher level of service than existing users unless the local government has provided a method whereby existing users make improvements to the existing services to meet the new, higher level of service.

(4) A local government may not require a subdivider to pay or guarantee payment for part or all of the costs of constructing or extending capital facilities related to education, and a local government may not require a subdivier to pay for impacts to state services or capital facilities."

RATIONALE: Amendments under §§76-3-510(1) and (4), MCA, also clarify the Act by affirmatively stating that local governments may only assess for impacts to the governing body's jurisdiction, not, for example, for impacts to state facilities located within local government limits or impacts from other jurisdictions felt within the county in question. By ensuring that local governments comply with the constitutional requirements of nexus and proportionality, this amendment will, if followed, protect local governments against suits and allegations relating to unlawful mitigation and unlawful off site improvement fees.

The amendment under subsection (2) clarifies that it is unlawful to require new development to pay costs associated with correcting existing deficiencies. This is a well-settled legal principal, and the amendment codifies that truism.

Subsection (3) authorizes local governments to hold new development to a higher standard of service as long as existing users are then also required to meet that new higher level. Thus subsection (3) is a fair and workable compromise whereby everyone who benefits from the increased level of service will pay their respective share for that benefit.

Section 5. Section 76-3-604 is amended to read:

"**76-3-604. Review of subdivision application -- review for required elements and sufficiency of information.** (1) (a) Within 5 working days of receipt of a subdivision application submitted in accordance with any deadlines established pursuant to 76-3-504(3) and receipt of the review fee submitted as provided in 76-3-602, the reviewing agent or agency shall determine whether the application

contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(c) If the governing body fails to comply with the time limits under subsection (1)(a), the application must be considered to contain all the required elements.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process. A request may not be made more than once following a determination that an application contains sufficient information for review.

(d) If the governing body fails to comply with the time limits under subsection (2)(a), the application must be considered sufficient.

(3)The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in ~~subsection~~ subsections (2) and (3), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) If the governing body fails to comply with the time limits under this section, the application must be considered approved by the local government.

~~(5)~~(6) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

~~(6)~~(7) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

~~(7)~~(8) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

~~(8)~~(9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations."

RATIONALE: The addition to §76-3-604(2)(c), MCA, serves two purposes, one of which will satisfy local government interests. First, this amendment prohibits the Board of Commissioners or Planning Department from repeatedly claiming that the application needs additional information or that a new issue was raised requiring further investigation. On the other hand, this amendment expressly grants local governments the authority to request more information once after a determination of sufficiency.

Sections 76-3-604(1), (2), and (5) establish a penalties when governing bodies fail to comply with review timelines dictated by state law. For element review, sufficiency, and final approval, if the governing body fails to act within the mandated timelines, then the application with be deemed to contain the required elements, to be sufficient, or to be approved, respectively. Without a penalty, state law is ineffectual. Nothing does more damage to order, process, and fairness than laws tacitly ignored.

Additionally, other states include similar provisions in their development codes. In many states, including California, Connecticut, Massachusetts,

New Jersey, New York, Pennsylvania, and Wisconsin, failure to act on an application pursuant to mandated timelines, constitutes approval.[1]

Section 6. Section 76-3-608 is amended to read:

"76-3-608. Criteria for local government review. (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, or planning board recommendations~~, or additional information demonstrates~~ demonstrate that, based on substantial credible evidence presented to the governing body, ~~development of~~ the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts on educational services.

(2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as applicable.

(3) A subdivision proposal must undergo review for the following primary criteria:

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[1] Bodega Bay Concerned Citizens v. County of Sonoma, 125 Cal. App. 4th 1061, 23 Cal. Rptr. 3d 327, 35 Envtl. L. Rep. 20016 (1st Dist. 2005), review denied, (Apr. 13, 2005) (holding that county board was authorized, approximately one month after the expiration date of a tentative subdivision map, to approve developer's timely filed application for an extension of the tentative map; board retains authority, after expiration of the time within which a developer is authorized to file a final map, to grant its timely application for an extension of that period so long as the aggregate five year period is not exceeded. West's Ann. Cal. Gov. Code § 66452.6(e)). Alan Wofsy & Associates v. City of Berkeley (Candelario), 237 Cal. Rptr. 7 (App. 1st Dist. 1987), review denied and ordered not to be officially published, (July 23, 1987) (final subdivision map became approved by operation of law due to inaction of city council); Where court deemed planning board's recommendation to deny subdivision approval as merely advisory according to city charter provision, which recited powers delegated to city of New London by the state, city council was obligated to act on planning board's decision. Failure of council to do so within 65-day statutory period warranted automatic subdivision approval despite planning board's conclusion to the contrary. Caldrello v. Planning Bd. of City of New London, 193 Conn. 387, 476 A.2d 1063 (1984). Slight deviations from standard parliamentary procedure do not warrant the sanction of automatic approval of subdivision application where statutory purpose of definitive action within time period has been achieved. See Merlo v. Planning and Zoning Com'n of Town of Wethersfield, 196 Conn. 676, 495 A.2d 268 (1985) (construing Conn. Gen. Stat. Ann. § 8-26); Paladac Realty Trust v. Rockland Planning Com'n, 541 A.2d 919 (Me. 1988) (60-day approval period did not apply to incomplete application); And see Kitras v. Jeffers, 2002 WL 31151206 (Mass. Super. Ct. 2002) (holding that definitive subdivision plan not acted on within 90 days is deemed approval, G.L. c. 41, §§ 81U and 81V); But N.H. Rev. Stat. Ann. § 36:231(c) has superseded an earlier provision which made approval automatic if the planning board did not act within a prescribed time. Now a board's inaction after 90 days from submission of plat permits the applicant to obtain an order from the selectmen directing the board to act within 15 days. Further failure of the planning board to approve or disapprove the application will then authorize automatic approval only "if the court determines that the proposal complies with existing subdivision regulations and zoning and other ordinances." The statute thus rejects the policy that an *unmeritorious* application for subdivision approval should be approved merely because the planning board takes too long to disapprove it. This statute was applied in Davis v. Town of Barrington, 127 N.H. 202, 497 A.2d 1232 (1985) (property owner had no right to automatic approval when board failed to act after 90 days); Purwin v. Bernards Tp. Planning Bd., 221 N.J. Super. 243, 534 A.2d 96 (Law Div. 1987) (subdivision permit application deemed approved due to passage of 45-day statutory period mandated by N.J. Stat. Ann. § 40-55D-47). Cf. Allied Realty, Ltd. v. Borough of Upper Saddle River, 221 N.J. Super. 407, 534 A.2d 1019 (App. Div. 1987) (automatic approval inappropriate). And see D'Anna v. Planning Bd. of Tp. of Washington, Morris County, 256 N.J. Super. 78, 606 A.2d 417 (App. Div. 1992) (misfiling by clerk did not trigger automatic approval period); King v. Chmielewski, 76 N.Y.2d 182, 556 N.Y.S.2d 996, 556 N.E.2d 435 (1990) (45-day approval period not tolled by pending county planning board review of town subdivision application); Application of Levin, 2 A.D.2d 774, 154 N.Y.S.2d 584 (2d Dep't 1956); Hilbol Realty, Inc. v. Barnhart, 205 Misc. 187, 126 N.Y.S.2d 865 (Sup 1953); Levin v. Cocks, 141 N.Y.S.2d 595 (Sup 1955); Northern Operating Corp. v. Chamberlain, 34 A.D.2d 686, 312 N.Y.S.2d 398 (2d Dep't 1970), order aff'd, 31 N.Y.2d 704, 337 N.Y.S.2d 513, 289 N.E.2d 554 (1972); Cohalan v. Schermerhorn, 77 Misc. 2d 23, 351 N.Y.S.2d 505 (Sup 1973); Fusaro v. Ziemba, 46 A.D.2d 688, 360 N.Y.S.2d 278 (2d Dep't 1974); Wallkill Manor Ltd. v. Coulter, 40 A.D.2d 828, 337 N.Y.S.2d 366 (2d Dep't 1972), order aff'd, 33 N.Y.2d 783, 350 N.Y.S.2d 416, 305 N.E.2d 494 (1973); Timothy F. Pasch, Inc. v. Springettsbury Tp. Bd. of Sup'rs, 825 A.2d 719 (Pa. Commw. Ct. 2003) (holding that developer was entitled to deemed approval of subdivision and development plan submitted to township board of supervisors, where board's decision denying approval did not specify defects found, did not describe requirements that were not met, and did not include citations to provisions or statute relied upon, as required by statute. 53 P.S. § 10508); Board of Sup'rs of Richland Tp. v. Tohickon Creek Associates, 123 Pa. Commw. 111, 553 A.2d 492 (1989) (90-day approval period in planning code included review by both planning commission and board of supervisors); Gorton v. Silver Lake Tp., 90 Pa. Commw. 63, 494 A.2d 26 (1985) (90-day approval period did not apply to massively deficient application); State ex rel. James L. Callan, Inc. v. Barg, 3 Wis. 2d 488, 89 N.W.2d 267 (1958) (failure of the planning board to act upon the plat within the statutory period gives rise to an assumption that the plat complies with the municipal requirements; otherwise it would have been rejected).

(a) except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, the impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety;

(b) compliance with:

(i) the survey requirements provided for in part 4 of this chapter;

(ii) the local subdivision regulations provided for in part 5 of this chapter; and

(iii) the local subdivision review procedure provided for in this part;

(c) the provision of easements for the location and installation of any planned utilities; and

(d) the provision of legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3) only when the impacts have been identified on the basis of substantial credible evidence. The governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

(5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.

(c) A governing body may not deny a subdivision due to the subdivision's impacts unless the governing body finds, based on substantial credible evidence, that the subdivision poses a significant risk to the public health and safety and that those impacts cannot be mitigated.

(6) The governing body may exempt proposed subdivisions that are entirely within the boundaries of designated geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have been met:

(a) the governing body has adopted a growth policy pursuant to chapter 1 that:

(i) addresses the criteria in subsection (3)(a);

(ii) evaluates the impact of development on the criteria in subsection (3)(a);

(iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and

(iv) identifies one or more geographic areas where the governing body intends to authorize an exemption from review of the criteria in subsection (3)(a); and

(b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:

(i) apply to the entire area subject to the exemption; and

(ii) address the criteria in subsection (3)(a), as described in the growth policy.

(7) A governing body may conditionally approve or deny a proposed subdivision as a result of the water and sanitation information provided pursuant to 76-3-622 or

public comment received pursuant to 76-3-604 on the information provided pursuant to 76-3-622 only if the conditional approval or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce."

RATIONALE: Section 76-3-608, MCA, is amended to establish an evidentiary standard for the approval and denial of subdivision application. The proposed standard is "substantial credible evidence." With this addition, cities and counties have more guidance with respect to what kinds of evidence can support an approval or denial. Again, "substantial credible evidence" is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." Montana Petroleum Tank Release v. Crumleys, Inc. (2008), 341 Mont. 33 citing Seltzer v. Morton (2007) 336 Mont. 225.

This amendment does not operate to shift the burden from the applicant to the governing body. It simply establishes the level or amount of evidence required for either approval or denial. As always, the applicant must show that he or she has complied with all applicable laws and regulations. As stated, the requirement to show "substantial credible evidence" applies equally to bases for approval and denial.

Amendments to this section also clarify that in order for local governments to require mitigation measures from the subdivision applicant, the need for that mitigation must be demonstrated. While current law requires precisely this, the experience of a majority of subdivision applicants is that mitigation is required as a right of passage rather than in order to mitigate the impact of the subdivision.

This amendment ensures that the letter of the current law will be followed by clarifying what information can form the basis of a mitigation requirement.

Other real life violations related to mitigation are local governments deeming certain impacts "unmitigatable" without any evidence whatsoever to that effect. The amendment under (5)(c) addresses that abuse.

Section 7. Section 76-3-615 is amended to read:

"**76-3-615. Subsequent hearings -- consideration of new information -- requirements for regulations.** (1) The regulations adopted pursuant to 76-3-504(1)(o) must comply with the provisions of this section.

(2) The governing body shall determine whether public comments or documents presented to the governing body by the public at a hearing held pursuant to 76-3-605 constitute:

(a) information or analysis of information that was presented at a hearing held pursuant to 76-3-605 that the public has had a reasonable opportunity to examine and on which the public has had a reasonable opportunity to comment; or

(b) new information regarding a subdivision application that has never been submitted as evidence or considered by either the governing body or its agent or agency prior to or at a hearing during which the subdivision application was considered.

(3) If the governing body determines that the public comments or documents constitute the information described in subsection (2)(b), the governing body may:

(a) approve, conditionally approve, or deny the proposed subdivision without basing its decision on the new information if the governing body determines that the new information is either irrelevant or not credible; or

(b) schedule or direct its agent or agency to schedule a subsequent public hearing for consideration of only the new information that may have an impact on the findings and conclusions that the governing body will rely upon in making its decision on the proposed subdivision.

(4) If a public hearing is held as provided in subsection (3)(b), the 60-working-day review period required in 76-3-604(4) is suspended and the new hearing must be noticed and held within 45 days of the governing body's determination to schedule a new hearing. After the new hearing, the 60-working-day time limit resumes at the governing body's next scheduled public meeting for which proper notice for the public hearing on the subdivision application can be provided. The governing body may not consider any information regarding the subdivision application that is presented after the hearing when making its decision to approve, conditionally approve, or deny the proposed subdivision."

RATIONALE: This amendment is also based on real life difficulties associated with the "new information" concept contained in the Act. For instance, some local governments have recently taken the view that questions and comments raised by the governing body constitute new information. On the basis of that interpretation, commissioners have free license to intentionally hold back comments in order to prolong the application process by raising the "new information" issue. The amendment to subsection (2) clarifies that new information raised by the government is not new information to the government.

Subsection (2)(b) is a common sense amendment which clarifies that if the planning department, commissioners, or council members are aware of certain information, that does not constitute "new information" simply because it was not presented in a public hearing. An example of such information is publicly known information, like the owner of a tract of land, information available on a government website, etc.

Section 8. Section 76-3-620 is amended to read:

"**76-3-620. Review requirements -- written statement.** In addition to the requirements of 76-3-604 and 76-3-609, following any decision by the governing body to deny or conditionally approve a proposed subdivision, the governing body shall prepare a written statement that must be provided to the applicant within 20 days of its decision, that must be made available to the public, and that:

(1) includes information regarding the appeal process for the denial or imposition of conditions;

(2) identifies the regulations and statutes that are used in reaching the decision to deny or impose conditions and explains how they apply to the decision to deny or impose conditions;

(3) provides the facts and conclusions that the governing body relied upon in making its decision to deny or impose conditions and references documents, testimony, or other materials that form the basis of the decision; and

(4) provides the conditions that apply to the preliminary plat approval and that must be satisfied before the final plat may be approved."

The amendment adds a policy statement that expressly identifies private property rights as an overarching concern but also acknowledges the state's interest in its natural resources and the public health. This balancing approach undeniably protects your interests while including language that anti-growth advocates can utilize.

RATIONALE: Section 76-3-620, MCA, is amended to require written notice to the applicant within 20 days of the public hearing and decision. Again, this change ensures the lawfulness and constitutionality of the Act, since arguably, the right to appeal under §76-3-625, MCA, is meaningless without actual and complete notice of the grounds for denial.

Section 9. Section 76-3-625 is amended to read:

"**76-3-625. Violations -- actions against governing body.** (1) A person who has filed with the governing body an application for a subdivision under this chapter may bring an action in district court to sue the governing body to recover actual damages caused by a final action, decision, or order of the governing body or a regulation adopted pursuant to this chapter that is arbitrary or capricious.

(2) A party identified in subsection (3) who is aggrieved by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may, after oral pronouncement of the governing body's decision and up to ~~within~~ 30 days after ~~the decision~~ receipt of the written statement as provided in 76-3-620, appeal to the district court in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.

(3) The following parties may appeal under the provisions of subsection (2):

(a) the subdivider;

(b) a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the county or municipality where the subdivision is proposed if that landowner can show a likelihood of material injury to the landowner's property or its value;

(c) the county commissioners of the county where the subdivision is proposed; and

(d) (i) a first-class municipality, as described in 7-1-4111, if a subdivision is proposed within 3 miles of its limits;

(ii) a second-class municipality, as described in 7-1-4111, if a subdivision is proposed within 2 miles of its limits; and

(iii) a third-class municipality or a town, as described in 7-1-4111, if a subdivision is proposed within 1 mile of its limits.

(4) For the purposes of this section, "aggrieved" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision."

RATIONALE: Changes to the §76-3-625(2), MCA, appeal provisions reflect the amendment under §76-3-620, MCA, and permit the applicant to appeal up to 30 days following issuance of the governing body's written decision. At present, the statute is vague and ambiguous with respect to when the applicant's appeal period begins and ends.

Section 10. Section 76-4-125, MCA, is amended to read:

"76-4-125. Review of subdivision application -- land divisions excluded from review. (1) Except as provided in subsection (2), an application for review of a subdivision must be submitted to the reviewing authority. The review by the reviewing authority must be as follows:

(a) At any time after the developer has submitted an application under the Montana Subdivision and Platting Act, the developer shall present a subdivision application to the reviewing authority. The application must include preliminary plans and specifications for the proposed development, whatever information the developer feels necessary for its subsequent review, any public comments or summaries of public comments collected as provided in 76-3-604~~(6)~~(7), and information required by the reviewing authority. Subdivision fees assessed by the reviewing authority must accompany the application. If the proposed development includes onsite sewage disposal facilities, the developer shall notify the designated agent of the local board of health prior to presenting the subdivision application to the reviewing authority. The agent may conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements.

(b) Except as provided in 75-1-205(4) and 75-1-208(4)(b), the department shall make a final decision on the proposed subdivision within 60 days after the submission of a complete application and payment of fees to the reviewing authority unless an environmental impact statement is required, at which time this deadline may be increased to 120 days. The reviewing authority may not request additional information for the purpose of extending the time allowed for a review and final decision on the proposed subdivision. If the department approves the subdivision, the department shall issue a certificate of subdivision approval indicating that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction.

(2) A subdivision excluded from the provisions of chapter 3 must be submitted for review according to the provisions of this part, except that the following divisions or parcels, unless the exclusions are used to evade the provisions of this part, are not subject to review:

(a) the exclusions cited in 76-3-201 and 76-3-204;

(b) divisions made for the purpose of acquiring additional land to become part of an approved parcel, provided that water or sewage disposal facilities may not be

constructed on the additional acquired parcel and that the division does not fall within a previously platted or approved subdivision;

(c) divisions made for purposes other than the construction of water supply or sewage and solid waste disposal facilities as the department specifies by rule;

(d) divisions located within jurisdictional areas that have adopted growth policies pursuant to chapter 1 or within first-class or second-class municipalities for which the governing body certifies, pursuant to 76-4-127, that adequate storm water drainage and adequate municipal facilities will be provided; and

(e) subject to the provisions of subsection (3), a remainder of an original tract created by segregating a parcel from the tract for purposes of transfer if:

(i) the remainder is served by a public or multiple-user sewage system approved before January 1, 1997, pursuant to local regulations or this chapter; or

(ii) the remainder is 1 acre or larger and has an individual sewage system serving a discharge source that was in existence prior to April 29, 1993, and, if required when installed, the system was approved pursuant to local regulations or this chapter.

(3) Consistent with the applicable provisions of 50-2-116, a local health officer may require that, prior to the filing of a plat or a certificate of survey subject to review under this part for the parcel to be segregated from the remainder referenced in subsection (2)(e)(ii), the remainder include acreage or features sufficient to accommodate a replacement drainfield."

RATIONALE: This amendment updates an internal citation.

NEW SECTION. **Section 11. Effective date.** [This act] is effective on passage and approval.